

IN THE
**United States
Circuit Court of Appeals**
FOR THE NINTH CIRCUIT

N. RUDEBECK, R. H. RAMSAY
and DORA A. RAMSAY,
Petitioners,

vs.

W. P. SANDERSON as Trustee in
Bankruptcy of the NONPAREIL
CONSOLIDATED COPPER COM-
PANY, a Corporation, Bankrupt,
and NONPAREIL CONSOLI-
DATED COPPER COMPANY,
a Corporation,
Respondents.

No. 2624.

**In the Matter of Nonpareil Consolidated Copper
Company, a Bankrupt**

Upon Review from the United States District Court,
for the Western District of Washington,
Northern Division.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE.

The bankrupt is a corporation organized and existing under and by virtue of the laws of the State of Washington, and was engaged in the business of mining ore (Record p. 13).

February 27, 1914, the petitioner, Nicholas Rudebeck, obtained judgment against the bankrupt

in the Superior Court of the State of Washington for Snohomish County, for the sum of Nine Thousand Two Hundred Seventy and 55/100 Dollars (\$9,270.55), with interest thereon until paid (Supp. Record p. 3-3).

February 28, 1914, the bankrupt filed its petition in the District Court for the Western District of Washington, Northern Division, praying that it be adjudicated a bankrupt. In the body of the petition it alleges:

“* * * That it owes debts which it is unable to pay in full; that it is willing to surrender all its property for the benefit of its creditors, except such as is exempt by law, and is desirous of obtaining the benefits of the Acts of Congress relating to bankruptcy; and its *Board of Directors has duly authorized such acts on its part,*”

and, in the verification, its president affirms that he “was duly authorized by resolution of the Board of Trustees of said corporation to execute the foregoing petition for and in behalf of said corporation for the purposes therein set forth” (Record pp. 14 and 15).

March 4, 1914, the adjudication of bankruptcy was made and entered (Record p. 16).

March 23, 1914, the petitioner, Nicholas Rudebeck, proved and filed his judgment as a claim against the bankrupt (Supp. Record pp. 1-4).

August 21, 1914, the claim of John P. Hoyt, as former Referee in Bankruptcy, was allowed by the court in the sum of Sixteen and 20/100 Dollars (\$16.20) (Supp. Record pp. ~~4-5~~).

November 30, 1914, an order to pay premiums on the bonds of the trustees amounting to Fifteen Dollars (\$15.00) was made by the court (Supp. Record p.~~5-6~~).

April 29, 1915, three appraisers were appointed and qualified (Supp. Record p.~~6-7~~).

May 15, 1915, an appraisement of the property of the bankrupt was filed (Supp. Record pp. ~~8-11~~).

June 3, 1915, an order was entered by the court allowing and directing the payment of Fifty-six and 10/100 Dollars (\$56.10) to each of the appraisers (Supp. Record p.~~7-8~~).

The petitions of Nicholas Rudebeck and R. H. Ramsay and the intervening petition of Dora A. Ramsay, to vacate the adjudication were filed June 24, 1915, June 29, 1915, and July 8, 1915, respectively (Record pp. 17-31).

The appraisement shows the bankrupt to be the holder of thirty-two unpatented mining claims; and the court will take judicial notice of the fact that the trustee must do the assessment work there-

on, as well as pay taxes on the other property of the bankrupt, and also incur heavy obligations and make large expenditures for the care, custody and preservation of its estate.

BRIEF OF THE ARGUMENT.

I.

Petitioners' first point is that it appears upon the face of the record that the District Court did not have jurisdiction to make the adjudication and is based upon the premise that a Washington corporation cannot commit the 5th Act of Bankruptcy through its trustees but only through its stockholders. In taking this position, they assume that an adjudication in bankruptcy *ipso facto* works a dissolution of the corporation, and cite statutes and cases in its support.

(a) There is nothing in the language of the bankruptcy act to prevent the corporation from resuming its business and the exercise of all of its corporate functions after it shall have obtained a discharge; and, so long as that is possible, it cannot, with any propriety, be said that the corporation is dissolved.

Morley vs. Thayer, 3 Fed. 737, 743;

Chemical National Bank vs. Hartford Deposit Co., 161 U. S. 1;

State vs. Merchant, 37 Ohio St. 251.

This view has been expressed by the Supreme Court of Georgia in the following language:

"The bankruptcy of a corporation does not put an end to its corporate existence nor vacate the office of its directors. A corporation of this state cannot be dissolved by an act of Congress, nor by the administration thereof through the Federal Courts. Georgia created, and she alone can destroy. Besides, it is not the policy of the bankruptcy law to dissolve corporations. The assets are seized, but the franchise is spared. 'Your money', and not 'your life' is the demand made by the bankruptcy act."

60 Ga. 174

The same view has been maintained by the courts in considering the effect of proceedings under the state insolvency and receivership laws, upon the existence of corporations.

Coburn vs. Boston, etc. Co., 10 Gray (Mass.) 243;

Boston, etc. vs. Longdon, 24 Pick. (Mass.) 49;

Stolze vs. Manitowoc, etc. Co., 100 Wis. 208;

Moseby vs. Burrow, 52 Texas 396;

Valley Bank vs. Sewing Soc., 28 Kansas 423;

Hasselman vs. Japanese, etc., Co., 2 Indiana App. 180;

In re Marshall Paper Company, 102 Fed. p. 872;

Sigua Iron Vo. vs. Brown, 171 N. Y. 494, 64 N. E. 194.

If the contention of the petitioners that the adjudication in bankruptcy works a dissolution of the corporation be true, then no judgment could be taken against it by the creditors for the purpose of determining the liability of stockholders after its discharge, (*In re Marshall Paper Co., supra*) ; nor could it affect a composition with its creditors and resume possession of its property and proceed with the conduct of its business.

(b) The board of trustees have power to commit the 5th Act of Bankruptcy without authorization of the stockholders. Under the laws of Washington “The corporate powers of a corporation shall be exercised by a board of not less than three trustees” (*Rem. & Bal. Sec. 3686*). The Supreme Court of Washington has held that the trustees of a corporation may make a general assignment for the benefit of creditors.

Nyman vs. Berry, 3 Wash. 734;

McKay vs. Elwood, 12 Wash. 579;

Cerf & Co. vs. Wallace, 14 Wash. 249.

The Circuit Court of Appeals for the Second Circuit says:

"It would seem to be reasonable to hold that the power to make the admission in writing could be exercised by the same officers who have power to make a general assignment, and, in the absence of statute or by-law regulating the subject, such power resides in the directors."

In re C. Moench & Sons Co., 130 Fed. 685.

"A board of directors ought to have the power to put the company into bankruptcy. They have care of the general business of the corporation. They are the persons who know whether the corporation is able to go on or not. It might very well happen that under the articles and by-laws of the corporation it would be impossible to hold a meeting of the stockholders for months. Under these circumstances the bankruptcy of the corporation might be delayed so long that in many cases the purposes of the bankrupt law would be defeated and preferences given."

In re Kenwood Ice Co., 189 Fed. 525; 204 Fed. 577.

"It is not to be presumed that there will be found in the general laws of the state, or in the articles of incorporation or by-laws, any express provision authorizing such admission; but, under the general law, the board of directors or trustees of the corporation have the power to authorize execution of an assignment of all property of the corporation for the benefit of its creditors, when such a step is advisable, unless such an assignment is prohibited by law, the articles, or by-laws. *Clark*

& Marshall on *Private Corporations*, par. 691; Thompson on *Corporations*, (2d Ed.) Sec. 6138."

Home Powder Company vs. Geis, 204 Fed. 568.

Trustees have power to put the corporation into bankruptcy.

In re Foster Paint and Varnish Co., 210 Fed. 652;

In re Lisk Mfg. Co., 167 Fed. 411.

We have been unable to find any case denying the power of the trustees to put the corporation into bankruptcy under laws similar to those of the State of Washington. The cases are cited and discussed in our citations above and we will not review them further.

In re Jefferson Casket Company, 182 Fed. 689, cited by petitioners, simply holds that the president of a corporation cannot put the corporation into bankruptcy without the authorization of the trustees, and seems to concede that the trustees would have such power.

In re Southern Steel Company, 169 Fed. 702, does not deny the power of the trustees, but merely holds that the resolution passed by the board of trustees did not authorize their attorney at law to commit the act of bankruptcy.

In re Bates Machinery Co., 91 Fed. 625, Judge Lowell bases his decision upon the statutes of Massachusetts, which provide that no conveyance or mortgage of corporate real estate, or lease thereof for more than one year, shall be made unless authorized by vote of the stockholders at a meeting called for the purpose, and that corporations similar to the Bates Company might apply by petition signed by an officer duly authorized by a majority of the corporators present and voting at a legal meeting called for the purpose, for the initiation of proceedings in insolvency against the corporation. He concedes, however, that prior to the enactment of these laws the Supreme Judicial Court of Massachusetts had held that the directors of an insolvent corporation were authorized to make a general assignment of its property for the benefit of its creditors (*Sargent vs. Webster*, 13 Metc. 497); and also that at this time it is pretty well settled by authority, that, under ordinary statutes or charters, the authority to make a general assignment inheres in the board of trustees.

In re Quartz Gold Mining Company, 157 Fed. 243, Judge Wolverton bases his decision upon the statute of Oregon providing for the dissolution of corporations.

Some point seems to be made by petitioners that the meeting of the trustees was held outside the State of Washington, but this is permitted by Sec. 3690 of *Rem. & Bal. Code*, as follows:

"A meeting of the board of trustees or directors of corporations, organized and existing under the laws of this state, may be held at such place or places within or without the state as may be designated in the articles of incorporation or by-laws."

II.

The petitioners are barred, by laches, of their right to vacate the adjudication. The adjudication, when made, imports the existence of all requisite jurisdictional facts, and it must affirmatively appear in the petition that the court *did not* have jurisdiction; for the silence of the petition on the jurisdictional facts is different from affirmative showing thereon that the jurisdictional facts *did not* exist.

In re Almira Steel Co., 109 Fed. 456;

Edelstein vs. U. S., 149 Fed. 636;

In re First National Bank, 18 A. B. R. 271;

Dodge vs. Kenwood Ice Co., 189 Fed. 525.

Default adjudication of a corporation will not be vacated merely because the petition fails to show that it was a corporation of the class subject to

bankruptcy, at any rate where the petition does not show that it was *not* of such class.

Dodge vs. Kenwood Ice Co., supra.

In re First National Bank of Belle Fourche,
18 A. B. R. 271, the court says:

"The petition contained no statement that Widell corporation was not engaged principally in the manufacturing pursuit and no showing that the court was without jurisdiction of the case; but it set forth the substance of a good cause of action, and it was impregnable after the adjudication."

Where the allegations are sufficient and the lack of jurisdiction is only provable by evidence, dehors the record, it is clear that laches may bar the right to move for a vacation of the adjudication.

In re New England Breeder's Club, 169 Fed. 586.

Now it appears from the record that the adjudication in this case was made on the 4th day of March, 1914; that the petitioner, Rudebeck, presented his claim against the estate of the bankrupt on March 23, 1914; that the petitioners, Ramsay, are residents of the State of Washington and knew of the adjudication as early as February, 1915, and that none of them sought to vacate the adjudication until the latter part of June, 1915, more than fifteen months after the adjudication. In the meantime

the trustees, under the direction of the court, had proceeded with the administration of the estate of the bankrupt to the point of selling its assets. Such laches under all of the authorities will bar the right of the petitioners to attack the adjudication, particularly where it appears upon the record that should the adjudication be vacated the judgment of the petitioner Rudebeck would become a lien upon the property of the bankrupt and thereby give him a preference, and this we apprehend is the sole objection of the attack on the adjudication.

In re First National Bank, 152 Fed. 64, the Circuit Court of Appeals for the Eighth Circuit held that there was no abuse of discretion in a denial of a motion by creditors to vacate the adjudication of the bankruptcy of a corporation where the motion was first made seven weeks after the petition was filed and receivers appointed, and five weeks after the adjudication, when the creditors were aware of the filing of the petition within forty-eight hours thereafter, and the administration of the estate had proceeded without objection meanwhile.

In re Ives, 113 Fed. 911, the Circuit Court of Appeals for the Sixth Circuit held that a petition to vacate the adjudication could not be maintained after the lapse of eight months during which other

rights had intervened, and that an allegation that the facts stated in the petition have become known to him "only recently", is insufficient.

In re Niagra Contract Company, 127 Fed. 872, it was held that where lack of jurisdiction did not appear on the face of the petition, the application to vacate the adjudication should be promptly made, the court using language quite applicable to this case as follows:

"The facts appearing on argument and by the affidavit of the trustee tending to show another motive for this application are not such as to predispose looking with favor upon this creditor's request to set aside the adjudication," and we do not think that this court should look with favor upon the application herein when it considers that the result, if not the motive, would be to give the petitioner Rudebeck a preference over other creditors of the bankrupt.

The unexplained delay of the petitioners in this case disentitles them, as a matter of right, to any vacation of the adjudication.

In re Urban and Suburban Realty Co., 132 Fed. 140.

The fact that preferences might be given was one of the principal reasons assigned for holding that the trustees of a corporation could commit the

Fifth Act of Bankruptcy in *In re Kenwood Ice Co.*,
189 Fed. 525, 204 Fed. 577.

It would seem also that the proving of his claim is such an acquiescence as will bar the petitioner Rudebeck from the right to move for a vacation of the adjudication for want of jurisdiction.

In re New York Tunnel Company, 166 Fed. 284;

In re Worsham, 142 Fed. 121.

We respectfully submit that the order of the District Court dismissing the petitions should be affirmed, and that, should this Honorable Court decide otherwise, the matter be remitted to that court with leave to answer and set out in full all of the facts relating to the proceeding including petitioner Rudebeck's connection therewith, and the obligations incurred and expenditures made by the trustee and his attorney in the administration of the estate of the bankrupt.

WM. HICKMAN MOORE,
Attorney for Respondents.